IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1102

AVCO COMMUNITY DEVELOPERS, INC.,

Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION, an agency of the State of California, and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION, an agency of the State of California,

Appellees.

On Appeal From the Court of Appeal of the State of California, Second Appellate District, Division Four.

JURISDICTIONAL STATEMENT.

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I
OPINION BELOW.

The unreported opinion of the Court of Appeal of the State of California, Second Appellate District, Divison Four, is set forth in Appendix A, *infra.*

II
JURISDICTION.

A. Procedural History.

Appellant, AVCO COMMUNITY DEVELOPERS, INC. ("Avco"), commenced the present action by the filing of a complaint seeking a writ of mandate declaring

that Avco had a vested right to develop its real property, known as Tract 7885, in accordance with the uses for which Orange County, California, had given final discretionary approval, free from the permit requirements of the California Coastal Zone Conservation Act of 1972, California *Public Resources Code* §§27000, *et seq.* (the "Act").[1] Avco claimed that development of Tract 7885 in accordance with these finally approved uses was exempt from this subsequent governmental regulation under the common law of vested rights and a constitutionally acceptable construction of the statutory exemption provided in §27404 of the Act. The trial court recognized that fairness required that Avco be permitted to develop Tract 7885 free from the permit requirements of the Act and granted Avco the requested writ of mandate in a judgment entered on August 5, 1974. A copy of the trial court's judgment is attached hereto as Appendix B.

Appellees, SOUTH COAST REGIONAL COMMISSION and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION (the "Commissions"), filed a notice of appeal with the California Court of Appeal on October 4, 1974. A copy of the notice of appeal is attached hereto as Appendix C.

After submission of all briefs and the hearing of oral argument, the Court of Appeal of the State of California, Second Appellate District, Division Four, took the case at bar under submission until the California Supreme Court rendered a decision in a companion case involving Tract 7479, an adjoining tract also owned by Avco (presently before this Court on

[1]All code references are to the California *Public Resources Code* unless expressly noted otherwise.

appeal as *Avco Community Developers, Inc. v. South Coast Regional Commission*, No. 76-888). The California Supreme Court filed its opinion on August 25, 1976, holding that Avco did not have a vested right to develop Tract 7479 free from the permit requirements of the Act, whereupon on August 31, 1976, the Court of Appeal filed the opinion which appears in Appendix A reversing the judgment of the trial court and denying Avco the writ of mandate sought.

Avco filed a petition for rehearing and modification before the Court of Appeal on September 15, 1976, which petition was denied on September 17, 1976. A copy of the notice of denial is attached hereto as Appendix D. Avco then filed a petition for hearing with the California Supreme Court on October 7, 1976, which petition was denied on November 12, 1976. A copy of the notice of denial is attached hereto as Appendix E. Avco's notice of appeal to this Court was filed with the clerk of the Court of Appeal on November 24, 1976. A copy of the notice of appeal is attached hereto as Appendix F.

B. Jurisdictional Ground.

The case at bar involves the construction of §27404, which states:

> "If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; provided that no substantial changes may be made in any such development, except in accordance with the provisions of this division. Any such person shall be deemed to have such vested rights if, prior to November 8, 1972, he

has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to the particular development or the issuance of a permit shall not be deemed liabilities for work or material."

Avco contends that, as construed by the California Supreme Court, and Court of Appeal, §27404 violates the provisions of the Fourteenth Amendment to the United States Constitution. This Court therefore has jurisdiction pursuant to 28 U.S.C. §1257(2). A claim that a state statute has been construed so as to violate a provision of the United States Constitution, if denied by the highest state court in which review could be had, invokes the appellate jurisdiction of this Court. *Cohen v. California,* 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921).

In the event that this Court does not consider appeal to be the proper mode of review, Avco hereby requests that this Jurisdictional Statement be regarded and acted upon as a petition for writ of certiorari pursuant to the provisions of 28 U.S.C. §2103.

III
QUESTIONS PRESENTED.

(1) Is it arbitrary, unreasonable, and capricious, and therefore a denial of due process of law under the Fourteenth Amendment, to interpret the building permit language of the vested rights section of subsequently enacted legislation

(§27404) as requiring a test which looks to the issuance of a permit to construct a specific building as the *sine qua non* of a claimed vested right to specific uses of real property which had received prior final discretionary governmental approval?

(2) Is it a denial of equal protection under the Fourteenth Amendment to recognize a vested rights claim of a county agency while refusing to recognize Avco's vested rights claim where the real property owned by the county agency is contiguous to Avco's real property, both parcels were being developed simultaneously by Avco, and neither the county agency nor Avco had been issued a building permit?

IV
STATEMENT OF THE CASE.

In 1972, by initiative, the people of the State of California adopted the California Coastal Zone Conservation Act of 1972. Section 27400 requires that any person (and §27105 defines "person" to include local governmental agencies) wishing to perform development within a specified area adjoining the Pacific Ocean obtain a coastal zone permit. Section 27404 provides a vested rights exemption to the permit requirements of the Act.

Prior to November 8, 1972, Avco had received final discretionary approval of the use, and the maximum density of each use, of each lot in Tract 7885 in addition to a number of other approvals and permits from Orange County including, but not limited to, the following:

(1) Amendment No. 4 to the general plan covering all of Avco's property including Tract 7885;

(2) A development plan for all of Avco's property including Tract 7885;

(3) Planned community zoning for all of Avco's property including Tract 7885;

(4) Planned community district regulations for all of Avco's property including Tract 7885;

(5) Tentative tract map for Tract 7885; and

(6) Grading permit for Tract 7885. (Finding of Fact No. 62, Clerk's Transcript ("C.T.") 507-508.)

In reasonable reliance upon these, and other, permits and approvals, Avco had begun to develop and construct a golf course and subdivision improvements on Tract 7885. The trial court found that these subdivision improvements constructed by Avco were reasonably intended to accommodate buildings and could not reasonably be used for any other purpose. (Finding of Fact No. 59, C.T. 507.) Prior to November 8, 1972, Avco had expended almost $340,000 and incurred liabilities in excess of $1,450,000 in developing that portion of Tract 7885 subject to the permit requirements of the Act. (Finding of Fact No. 43, C.T. at 503.) Avco had not obtained a permit to construct any specific building on Tract 7885 before November 8, 1972 (Finding of Fact No. 38, C.T. 503), but had been granted a grading permit, effective as of October 24, 1972. (Finding of Fact No. 37, C.T. 502-503.) The grading permit constituted the "building permit" for the golf course which was, in turn, an integral part of Tract 7885. (Finding of Fact No. 37, C.T. 502-503.) Under the procedure mandated by Orange County's ordinances, a building permit cannot be issued until after grading has been completed

and Avco had not completed the grading as of November 8, 1972. (Finding of Fact No. 38, C.T. 503.)

By an agreement known among the parties as the "Beach Agreement", Avco sold approximately 34 acres of Tract 7479 to the Orange County Harbor District. Eleven acres were sold at substantially less than the fair market value with the sale being conditioned upon the performance of various actions by Orange County and the State of California. (Finding of Fact No. 14, C.T. 493-494.) Part of the Beach Agreement required Avco to develop the 34 acres, including the construction of several buildings, for the Orange County Harbor District. In order to do this Avco applied for an exemption from the permit requirements of the Act on behalf of the Harbor District at the same time it applied for an exemption to complete the development of the balance of Tracts 7479 and 7885. Development of the 34 acres was planned to be performed simultaneously with the remainder of Tract 7479 (and, in fact, development was commenced simultaneously) as the two parcels of land were intended to be served by common utilities. While the Commissions recognized the vested rights claim which Avco had asserted on behalf of the Harbor District, the Commissions refused to recognize Avco's own vested rights claim to either of Tracts 7479 or 7885.

Avco first raised federal constitutional questions in its petition for writ of mandate (C.T. 5-6) and raised them once again in its supplement to petition for writ of mandate. (C.T. 138-139.) The trial court upheld the validity of the Act, stating:

"The Act is not unconstitutional as applied to Petitioner and is not invalid nor does it violate the Fifth or Fourteenth Amendments to the Consti-

tution of the United States . . ." (Conclusion of Law No. 12, C.T. 511.)

Having prevailed in the trial court, Avco did not argue the constitutional questions before the Court of Appeal. However, it was specifically pointed out that Avco had not abandoned them. See Respondent's Brief at 7, n. 2. Avco raised the constitutional questions before the Court of Appeal with the petition for rehearing and, again, in its petition for hearing before the California Supreme Court.

The questions presently before this Court were thus timely raised before the courts of the State of California and are presently within this Court's appellate jurisdiction.

V

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

The federal questions presented to this Court are substantial in three senses of the word. First, whether due process requires that a developer have a permit allowing construction of a specific building as a condition precedent to the acquisition of vested rights to specifically approved uses and densities of use of lots in the subdivision development context will determine the outcome of the case at bar. Second, federal law is unsettled as to the conditions precedent to the acquisition of a vested right because this Court has not addressed the question for over 70 years since its decision in *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904). Third, the question presented for this Court's review goes directly to the definition of property, the relationship between property rights and governmental regulation, the protection contained in the

Fourteenth Amendment to the United States Constitution, and the application of the equal protection portion of the Fourteenth Amendment when it is a governmental agency, rather than another private person, who is given an unfair advantage.

A. The Law Is Unsettled as to Whether a Vested Right to Complete Development of a Multi-Acre, Multi-Structure Residential Subdivision Can Be Established Where a Developer Has Substantially Relied in Good Faith on Governmental Approvals of Specific Uses and Densities but Where a Permit to Construct a Specific Building Has Not Been Issued.

As noted above, one of the questions presented for this Court's review is the interaction between due process and the conditions precedent to the acquisition of a vested right. When limited to the situation of a single building on a single lot, Avco has no quarrel with the definition provided by the California Supreme Court:

> "It has long been the rule of this State and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied." *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791, 132 Cal.Rptr. 386, 553 P.2d 546 (1976) [citations omitted].

As pointed out by the California Supreme Court,[2] it has been generally held that where a developer claims a vested right to construct a *single identifiable building* the required governmental approval is a "building permit", that is, a document identifying the specific building to be constructed. (17 Cal.3d at 792-793.) What is not clear, and what is being presented for this Court's review, is whether the required "permit" in the subdivision context is the same piece of paper. The California Supreme Court's opinion makes it clear that it is. The Court's opinion stresses the lack of specificity as to the buildings to be constructed (17 Cal.3d at 794) while completely overlooking the fact that Avco's contention is not that it has a right to construct specific buildings but rather that it has a vested right to complete the development of Tract 7885 consistent with the uses (multi-family residential buildings integrated with a golf course) and up to the densities specifically approved by Orange County subject to the obvious *caveat* that Avco comply with the terms and provisions of the Orange County building code in order to have permits allowing the construction of specific buildings issued.[3] It is this oversight by the California

[2]Although this appeal is taken from the judgment of the Court of Appeal, that court relied entirely on the California Supreme Court's opinion:

> "Although the facts are slightly different and a different tract of land is involved, all of the parties' contentions are disposed of in *Avco Community Developers, Inc. v. South Coast Regional Commission,* ..... Cal.3d ..... (1976)." Appendix A at p. 7.

Because the Court of Appeal set forth no legal reasoning of its own, Avco will hereafter refer to the decision and reasoning of the California Supreme Court directly.

[3]Avco is in complete agreement with the statement of applicable law as found in 2 Antieau, *Municipal Corporation Law* §16A.12 at 16A-25 (1973):

> "One in possession of a valid permit should be aware that at any subsequent date he can be exposed lawfully to those police power controls, such as regulations found in fire prevention ordinances, *building codes* etc., which are necessary to protect the public health, morals, welfare or safety." [Footnote omitted; Emphasis added.]

Supreme Court that is at the heart of Avco's claim that a test of vested rights as to *use* in the subdivision context is arbitrary, unreasonable, and capricious.

Avco contends now, as it has contended in the past, that the public safety will be adequately protected upon the issuance of building permits because no such permit will be issued unless Avco has complied with the requirements of the building code in force at the time a permit is sought. Avco further contends that reasonable regulation by the Commission is also permitted to the extent that it does not deprive Avco of its vested right to the previously approved uses of Tract 7885.

More specifically, Avco contends that it has a vested right to develop Tract 7885 as a multifamily, multistructure residential development integrated with a golf course. Although densities have been approved, the location and size of specific buildings have not. Thus, just as Orange County has the right to add a requirement for, say, the installation of smoke detectors before a building permit will be issued, so do the Commissions retain the power to limit the height or location of buildings. However, Avco contends that neither Orange County nor the Commissions can impose new requirements which deprive Avco of its vested right to the previously approved uses of Tract 7885, up to the previously approved densities.

Other state courts have recognized that constructing a subdivision is quite different from erecting a single

building. A number of cases have found that developers constructing a subdivision had gained vested rights to complete the entire development after expending funds and incurring substantial liabilities in good faith reliance upon approved tentative tract maps or similar approvals.

Thus, in *Ward v. City of New Rochelle,* 20 Misc.2d 122, 197 N.Y.S.2d 64 (Sup. Ct.), *aff'd* (unanimously), 9 App.Div.2d 911, 197 N.Y.S.2d 128, *aff'd* (unanimously), 8 N.Y.2d 895, 204 N.Y.S.2d 144, 168 N.E.2d 821 (1960), the plaintiff was held to have a vested right to complete her development as planned, notwithstanding a change in applicable zoning. The zoning ordinance was amended, doubling the minimum lot size, almost immediately after the plaintiff's subdivision map was approved by the city. While the plaintiff had not commenced any construction on the site, she had, as a condition to subdivision map approval, dedicated and deeded a portion of the land, worth $140,-000, to the city as a school site, just as Avco in the case at bar deeded land to the Orange County Harbor District, pursuant to the Beach Agreement, at a price below the fair market value. The New York courts unanimously found vested rights had accrued to the subdivider to complete her development:

> "Most cases of vested rights grow out of circumstances in which a permit has been issued by some municipal official with authority, and pursuant to that permit the permittee proceeds with his improvements, spends money to further it, and obligates himself with reference to it. It should be pointed out that if, in such cases, a vested right comes into being, although such expenditures are expected to be recouped by the sale of lots,

> how much more readily should a vested right come into being in a case such as this, where the [owner] has actually permanently parted with land of great value for the benefit of the School District and the City, as well, with no chance of recoupment, as in the case of the usual permittee, who claims a vested right." 197 N.Y.S.2d at 70-71.

In still another New York case, *Elsinore Property Owners Association, Inc. v. Morwand Homes,* 286 App. Div. 1105, 146 N.Y.S.2d 78 (1955), a group of property owners sought an injunction against a builder's completion of a subdivision, alleging that the builder was not complying with an amended zoning ordinance which had increased minimum lot size, width, and sideyard requirements. The builder defended by claiming a vested right to complete the subdivision as planned, *i.e.,* to be allowed to use it for the previously approved uses. The undisputed facts showed that defendant's predecessor in interest had received subdivision map approval for the entire tract (based upon the smaller lots) and had constructed (at a cost of $40,000) all of the required public improvements and some of the homes prior to the change in zoning requirements. The New York Supreme Court, Appellate Division, unanimously affirmed the trial court in granting judgment in favor of the builder, stating:

> "In our opinion, the original developers [and hence its successor] which furnished a performance bond and expended a substantial sum on required improvements, and which was not in default when the amendment was enacted, had a vested right to complete the development as planned, notwith-

standing the area amendment of the zoning ordinance." 146 N.Y.S.2d at 81.

Also pertinent is *Appeal of Diamond*, 413 Pa. 379, 196 A.2d 363 (1964). There, the defendant planned a large, comprehensive development consisting of high-rise apartments, office buildings, and a shopping center. The township board rezoned the property to enable construction of the planned development. The defendant then obtained a permit for the first (of five) high-rise apartment buildings and commenced construction, incurring substantial liabilities. Subsequently, the defendant sought a building permit for the shopping center, and the plaintiff, a "civil association", objected to the permit and sought an injunction against completion of the development because of alleged illegality in the rezoning. The Pennsylvania Supreme Court held that the plaintiff had waived its right to object to the rezoning by failing to object to the issuance of the permit for the first high-rise.[4] The Court stated that an

> ". . . integrated, comprehensive, stated development of a large tract may and should be treated as a single undertaking. . . . To allow a complex, comprehensive plan . . . to be attacked on a piece by piece basis would result in the greatest inequities to the developers." 196 A.2d at 370.

Many other jurisdictions have reached the same result. For example, in *River Forest State Bank v. Village of Hillside*, 6 Ill.2d 451, 129 N.E.2d 171 (1955), a developer was held to have acquired a vested right

[4]In Pennsylvania, objections to zoning violations may only be raised by appeal from the grant or denial of the building permit. (196 A.2d at 367.)

to complete a 42 lot subdivision using septic tanks, despite a subsequently adopted ordinance requiring sewer systems, because the subdivider, in reliance on the Village's subdivision map approval, had incurred $20,000 in expenditures for water mains "to prepare the premises for the building of homes" prior to the adoption of the sewer ordinance. (129 N.E.2d at 173.)

See also, *DeKalb County v. Chapel Hill, Inc.*, 232 Ga. 238, 205 S.E.2d 864 (1974), where the Georgia Supreme Court held that a developer had a vested right to complete its development of apartments and townhouses and ordered that the development permit[5]

[5]Apparently another name for a "building permit" because the opinion speaks of

> ". . . processing Chapel Hill's application for a development permit for its proposed construction of apartments and townhouses, and to issue such development permit, provided Chapel Hill's application shall comply in full with designated requirements of the DeKalb County Zoning Ordinance." 205 S.E.2d at 866.

"In reliance on the approval of its Community Unit Development Plan it has expended over $50,000 in developing a lake and recreational area. It has installed 2,000 linear feet of a sewer line for the anticipated apartments and townhouses. It has lost approximately $30,000 as the result of having to rescind a contract for the sale of the property on which the apartments and the townhouses were to be constructed. The diminution in value of the 125 acres planned for apartments and townhouses which can now be used only for single family dwellings, is approximately $1,500,000.00.

"Chapel Hill contends that it has acquired a vested property right, protected by the State and Federal Constitutions, by reason of its actions and expenditures made in reliance upon the approval of its plan.

* * *

"After Chapel Hill had expended substantial sums in developing its property, and dedicated park and school property to the county, all in reliance on this approval [of the Community Unit Development Plans], vested rights were acquired by it which can not be destroyed by the enactment of a later ordinance which required that rezoning be obtained for community unit development plans, and thereafter denying the necessary rezoning." 205 S.E. 2d at 867, 868.

be issued. The opinion stressed the substantial good faith reliance of the developer and the results flowing therefrom.

Again, in *Gruber v. Mayor and Tp. Com. of Raritan Tp.*, 39 N.J. 1, 186 A.2d 489 (1962), the New Jersey Supreme Court, citing *Elsinore Property Owners Association, supra,* with approval, found that a subdivider who had constructed four model homes, graded roads, built sidewalks and curbs and installed power poles (a total of $508,000 in expenditures and commitments)—all in reliance on the township's subdivision map approval—had a vested right to complete the residential development despite the passage of a new zoning ordinance (none had previously existed) limiting the use of the property to industrial uses.

Finally, in *Meuser v. Smith,* 74 Ohio L. Abs. 417, 141 N.E.2d 209 (1956), the developer bought eleven acres of unzoned property intending to use it as a trailer park. The developer filed a development plan for the park and received a building permit for one of the utility buildings to be constructed on it. Construction work had started (to the extent of excavating and constructing footers) when it was halted by a temporary restraining order. Thereafter the property was rezoned for agricultural and residential uses, neither of which allowed the property to be used as a trailer park. The court upheld the developer's contention

> ". . . that by starting construction they did establish an 'existing' use within the meaning of the applicable regulation and enabling statutes; that they acquired a vested right to complete such and use the same under the 'due process' clause of the United States Constitution, Amend. 14." 141 N.E.2d at 211.

In other words, the developer in *Meuser* had received a permit which allowed the construction of one of the improvements required to make the land suitable for its ultimate use. The utility building had no value standing alone; its value lay in the role it was to play as part of a completed trailer park. The developer's reliance on the permit, combined with the existence of a development plan, was held sufficient to grant the owner the *use* which he had intended.

Avco is in precisely the same position. The specific use, and the maximum density of that use, of Tract 7885, had received prior governmental approval. By grading and constructing subdivision improvements on Tract 7885, Avco had commenced the construction of its integrated golf course and residential community. Like the developer in *Meuser,* Avco had begun construction of improvements required to effectuate the intended use of Tract 7885 as a residential development integrated with a golf course. On these facts, combined with the numerous approvals which had been previously granted to Avco, Avco contends that, like the developer in *Meuser,* it has established an existing use and has a vested right to complete Tract 7885 for the residential and golf course uses previously approved, up to the densities previously approved.

The foregoing authorities have recognized that much time, effort, and money is expended by a builder in reliance on governmental approvals prior to the issuance of a permit to construct a specific building. They recognize that subdivisons are built in increments of a limited number of buildings. Subdividers develop their property in increments to ". . . facilitate orderly financing, development and selling . . ." *Telimar Homes, Inc. v. Miller,* 14 App.Div.2d 586, 218 N.Y.S.2d 175,

176 (1961). They have also recognized that the rights inhering in the developer of a subdivision are radically different from those inhering in one who would build a single building. The developer seeks to have a specific *use* recognized. That use is realized through the construction of various buildings over a period of time as buyers make their wants known. The reality of subdivision development requires incremental construction whose pace is controlled, in part, by lenders' reasonable concern for the adequacy of the security provided, *i.e.,* a saleable residential subdivision. The builder of a single building seeks the government's permission to erect a specific structure at a specific time. The "building permit" is the final approval for the subdivision developer and the initial one for the builder of a single building.

To hold that a subdivider can achieve no vested rights, absent a "building permit", would mean that every subdivider would be hostage to any change, otherwise valid, promulgated by an appropriate governmental body. Such a holding, having ramifications far beyond the present controversy between Avco and the Commissions, would wreak havoc with the building industry, not only in California, but throughout the nation. As the Supreme Court of Utah said in *Wood v. North Salt Lake,* 15 Utah 2d 245, 390 P.2d 858, 860 (1964), where it held that a developer had vested rights to develop a subdivision as originally platted, notwithstanding the fact that an ordinance had subsequently been adopted increasing the minimum lot size:

> "This ordinance, if sanctioned, easily could dry up the mortgage market for investors in platted subdivisions, could alienate title companies from insuring any lots therein, discourage purchase of lots, and long-range subdivision development, impale title lawyers on the horns of a dilemma, and lead to a policy of accepting plats, only to sanction their arbitrary rejection, if one chooses not to build on vacant property within the year. All of which this court cannot deify."

The foregoing authorities make it clear that the position of the California Supreme Court is not universally accepted. The highest courts of other states have found that fairness (and what is due process but the legal embodiment of fairness? See, *Galvan v. Press,* 347 U.S. 521, 530 (1954)) requires that the test of vested rights be suited to the factual situation of individual cases.

These cases are cited for two propositions. First, that the California Supreme Court is wrong in its view that a building permit is always required to acquire vested rights and that its view is a violation of the guaranty of due process. Second, that there is a definite split of authority among state courts on an important question of constitutional law which has a tremendous fiscal and social impact. This Court last decided a vested rights question in 1904 when it decided *Dobbins, supra,* and held that substantial reliance on a prior governmental approval established a vested right good against rezoning. But *Dobbins* did not speak to the question of fairness and due process in the context of modern land development practice in a time of spiraling costs for one of the most basic of human needs—housing.

> "The importance of the question, in which many States having similar laws are concerned, . . . , and the economic conditions which have supervened, and in the light of which the reasonableness

of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think it imperative, that in deciding the present case the subject should receive fresh consideration." *West Coast Hotel v. Parrish,* 300 U.S. 379, 390 (1937).

B. Due Process Requires That a Developer of a Subdivision Have a Claim of Vested Rights Evaluated in a Fair and Reasonable Manner Rather Than by the Use of a Procrustean Rule Suited Only to the Construction of a Single Specific Building on an Isolated Lot of Ground.

Strictly speaking, the doctrine of vested rights is purely constitutional in nature, but, in practice, it is applied in terms of fairness and an equitable estoppel against the governmental entity involved. Heeter, *Zoning Estoppel: Application of the Principle of Equitable Estoppel and Vested Rights to Zoning Disputes,* Urban Law Annual 63 (1971). In the case at bar the trial court concluded:

> "Basic fairness to Petitioner requires the Petitioner be permitted to complete development of Tract 7885 including the construction of improvements and buildings thereon per its Planned Community District Regulations and the tentative tract map of said tract." (Conclusion of Law No. 10, C.T. 511.)

In determining the rule to be applied when a developer, such as Avco, claims a vested right, a court of equity must look to the facts and circumstances of each case and not be constrained by prior rules which may be only partially applicable. The Supreme Court of Georgia recognized this when it said, in *Kiker v.*

City of Riverdale, 223 Ga. 142, 143, 154 S.E.2d 17 (1967):

> "Estoppel arises under a variety of circumstances and generally the cases rather than any rule must be reviewed and applied."

The rule which looks to the existence of building permits is a very mechanical test. Such a rule may make sense in the context of the construction of a single building but it is inappropriate and arbitrary in the case of a subdivision, which, as in this case, contemplates specific uses and the expenditure of substantial sums before the first building permit can be applied for or issued or the first building's foundation poured. It is beyond question that the use of a mechanical test, such as the existence *vel non* of a building permit, allows the drawing of a bright line by which all may be guided in their actions. It is also beyond dispute that such a line will often lead to injustice and unfairness in individual cases as in the case at bar. The application of such a one dimensional Procrustean test in the context of the development of a subdivision is almost guaranteed to lead to such unfairness and injustice.

This Court has made it very clear that the dictates of due process prohibit such an arbitrary test.

> "We have often repeated that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every conceivable situation.' " *Wolff v. McDonnell,* 418 U.S. 539, 560 (1974) [citation omitted].

By effectively requiring a "building permit" before a developer can acquire a vested right to specifically approved uses, the California Supreme Court has

effectively created an irrebuttable presumption that no vested right can ever be obtained absent such a piece of paper. This Court has frequently stated its views on irrebuttable presumptions.

> "Statutes creating permanent irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." *Vlandis v. Kline,* 412 U.S. 441, 446 (1973).

The definitive statement of this Court's views may be found in *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972), where an irrebuttable presumption, that an unwed father was an unfit parent, was struck down.

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." [Footnotes omitted.]

See also, *U.S. Department of Agriculture v. Murry,* 413 U.S. 508 (1973).

Further, this Court has frequently stressed that what satisfies the dictates of due process in one situation may not in another.

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.' Due process of law guarantees 'no particular form of procedure; it protects substantial rights.' 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 610 (1974) [citations omitted].

See also *Mathews v. Eldridge,* 424 U.S. 319, 47 L. Ed.2d 18, 33 (1976).

The holding of the California Supreme Court, that Avco cannot obtain a vested right to the previously approved residential use of its property, absent a "building permit", constitutes a denial of due process. It should not be allowed to stand.

C. Recognizing a Vested Right to Complete the Development of Land Owned by the Harbor District, While Refusing to Recognize Avco's Vested Rights Claim, Constitutes a Denial of Equal Protection.

In its opinion the California Supreme Court summarily disposes of Avco's equal protection argument by stating that the grant of an exemption to the Harbor District is validated "on the basis of different facts." (17 Cal.3d at 802, n. 11.) The Court's statement is, however, directly contradicted by the facts as found by the trial court. This Court is respectfully requested

to take judicial notice of Finding of Fact No. 58, C.T. 386-387, in the companion case, 76-888, presently before this Court. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 157 (1969) ("As the respondent suggests, we may properly take judicial notice of the record in that litigation between the same parties who are now before us.").

The trial court found that the development of that portion of Tract 7479 sold to the Harbor District was planned jointly with the development of the remainder of Tract 7479 retained by Avco; that the portion sold was to be improved concurrently with, and as a part of, the remainder of Tract 7479; that grading of the part sold was under the same grading permit covering the remainder of Tract 7479; and that the portion sold could not be graded apart from the remainder of Tract 7479. Moreover, the administrative record indicates that the approvals dealing with the portion sold were identical to those dealing with the remainder of Tract 7479, *i.e.,* no building permits had been issued for the beach portion of Tract 7479. (Administrative record 212.)

In light of these findings of fact, it is impossible to escape the conclusion that Avco has been denied equal protection of the law. The beach portion of Tract 7479 was held to be exempt but both Tracts 7479 and 7885 were held to be subject to the permit requirements of the Act even though there is no evidence in the record to show that building permits were ever issued for the beach portion of Tract 7479. The remedy for such a consummated denial is to grant Avco the same right. *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239 (1931).

VI
CONCLUSION.

For all of the foregoing reasons, probable jurisdiction should be noted.

DATED: February 4, 1977.

Respectfully submitted,

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
LAWRENCE R. RESNICK,

Attorneys for Appellant
Avco Community Developers, Inc.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Avco-Community Developers, Inc., etc., Petitioner and Respondent, vs. South Coast Regional Commission, etc., et al., Defendants and Appellants. Civ. No. 45785, (Superior Court No. C 68939).

Filed: Aug. 31, 1976.

APPEAL from a judgment of the Superior Court of Los Angeles County. David N. Eagleson, Judge. Reversed.

Evelle J. Younger, Attorney General, Carl Boronkay, Assistant Attorney General, Roderick Walston and Donatas Januta, Deputy Attorneys General, for Defendants and Appellants.

Fulop, Rolston, Burns & McKittrick, Lawrence B. Resnick and Kenneth B. Bley for Petitioner and Respondent.

The South Coast Regional Commission (hereinafter "regional commission") denied the application of Avco Community Developers, Inc. (hereinafter "Avco") for an exemption of Avco's Tract 7885 from the permit requirements of the California Coastal Zone Conservation Act of 1972 (Pub. Resources Code § 27000 et seq., hereinafter "Act"). Avco appealed such denial to the California Coastal Zone Conservation Commission (hereinafter "state commission"), which likewise denied the exemption. Thereafter, in the superior court, Avco filed a petition for a writ of mandate ordering defendants regional commission and state commission to grant the exemption. Judgment was entered for

the issuance of a peremptory writ of mandate commanding the state commission to set aside its prior decision and issue an appropriate exemption certificate acknowledging that the completion of Tract 7885 and the buildings thereon is exempt from the permit requirements of the Act. Defendants appeal from the judgment.

At the trial, the only evidence received was the record of the administrative proceedings of defendant commissions. Based upon that evidence, the trial court made the following findings of fact: Avco is the owner and developer of Laguna Niguel, which consists of 7,936 acres of land within the unincorporated area of Orange County; the "Capron Property" is part of Laguna Niguel and was purchased by Avco in 1968; it consists of 836 acres located adjacent to the Pacific Ocean; Tract 7885 consists of 416.5 acres within the Capron Property; of these 416.5 acres, 139 are within the permit area as defined in the Act;[1] in 1964 Avco adopted the Laguna Niguel General Plan for development of the Laguna Nigel Planned Community; the Capron Property has been developed primarily for residential and recreational uses, all of which are interrelated through pedestrian systems, bicycle trails, street and highways systems and utility, sewer and drainage systems.

The court further found: "[D]uring 1970 the following portions of the development on Tract 7885 were completed: widening of Pacific Coast Highway with

[1]" 'Permit area' means that portion of the coastal zone lying between the seaward limit of the jurisdiction of the state and 1,000 yards landward from the mean high tide line of the sea. . . ." (Pub. Resources Code § 27104.)

On or about February 1, 1973, any person wishing to perform any development within the permit area must obtain a permit authorizing such development from the regional commission. (Pub. Resources Code § 27400.)

sewer drains, water and other utilities"; on September 22, 1971, Avco and Orange County entered into a written agreement (the "Beach Agreement") for the sale by Avco to the county of 11 acres of sandy beach at a price less than fair market value, for the additional sale of 23 acres of land (for parking) at fair market value, and the dedication by Avco of certain land for access to the beach; in return, the county was to: (1) approve Amendment No. 4 to the Laguna Niguel General Plan; (2) enact an ordinance imposing planned community zoning upon the Capron Property, as requested by Avco; (3) approve Avco's mass grading plan; and (4) seek enactment by the state Legislature of a bill approving the agreement; on October 21, 1971, the Legislature approved the beach agreement, which thereafter was executed as provided; in subdividing and improving Tract 7885, Avco relied upon the approvals and enactments specified in the Beach Agreement; on November 24, 1971, upon enactment of an ordinance by the county, the planned community district regulations for Laguna Niguel became effective; such regulations set forth the following information regarding development of the Capron Property: (1) standards of low density residential development, including density ranges, building heights, setbacks and off-street parking; (2) standards for high density residential development, including access, building separations, view restrictions, building site coverages, building setbacks, fencing, walls and special view restrictions; (3) standards for general commercial development; (4) standards for neighborhood commercial development; (5) standards for industrial development; (6) requirements for parks and pedestrian green belts; (7) standards for community facilities;

and (8) regulations regarding signs; on December 8, 1971, general plan amendment No. 4 was approved by the county and became effective; on September 13, 1972, the county approved a sixth revised tentative tract map for Tract 7885, which map specified land use; on September 28, 1972, the county issued a permit for the grading of Phase I of Tract 7885; on September 29th the grading permit was suspended pending Avco's filing of an environmental impact report for Tract 7885; on October 24th, such a report was approved, and on that date the grading permit was reinstated; grading was commenced on October 25, 1972; Avco never obtained a permit labeled "building permit" for the construction of buildings on Tract 7885; however, the grading permit was the "building permit" for a golf course being constructed as an integral part of Tract 7885; on November 8, 1972, portions of Tract 7885 were under construction, said construction being the grading of Tract 7885; by November 8, 1972, Avco had spent $339,712, and had incurred liabilities in the sum of $1,469,793, in connection with the development of Tract 7885 within the permit area; by February 1, 1973, such expenditures and liabilities had increased to $895,298 and $1,729,477, respectively; on February 14, 1973, the county issued a mass grading permit for Phase II of Tract 7885.

The court also found: by approving General Plan Amendment No. 4, the planned community district regulations and the tentative tract map, and by issuing the grading permits, the county caused Avco reasonably to believe that it could subdivide, improve and construct buildings on Tract 7885 without further discretionary governmental approval; prior to November 8, 1972, Avco, in good faith and in reliance on the plan, the

regulations, the map and the grading permits, diligently commenced construction and performed substantial work in developing Tract 7885, and incurred substantial liabilities for labor and materials; at all times, Avco had a detailed, specific plan for the subdivision, improvement and construction of Tract 7885; the maximum number, size and types of buildings to be erected thereon could be ascertained by reference to the tentative tract map and the planned community district regulations; Avco performed substantial lawful construction on Tract 7885 prior to February 1, 1973; although there was no construction of buildings thereon, there was grading of the golf course, construction of sewers and storm drains, and widening of the Pacific Coast Highway; such subdivision improvements were intended to accommodate the buildings to be erected on Tract 7885, and could not reasonably be used for any other purpose; the development of Tract 7885, permissible under the tentative tract map and the planned community district regulation, was and is the construction of multiple residential buildings; the primary development of Tract 7885 consists of an 18-hole public golf course, 11 holes of which are within the permit area and 7 of which are outside the permit area; the entire Tract 7885, including homesite locations and street locations, was "designed around said golf course and constitutes an interrelated and interdependent whole."

From the foregoing findings of fact, the trial court determined, as conclusions of law: under the common law principle of "vested rights," Pub. Resources Code § 27404 and the decision of the Supreme Court in *San Diego Coast Regional Com. v. See The Sea, Limited,* 9 Cal.3d 888 (1973), that Avco is entitled to

construct improvements and buildings on Tract 7885 free from the permit requirements of the Act.

The Act declares that the coastal zone is a valuable resource belonging to all the people, and that in order to protect this resource it is necessary to study the coastal zone, prepare a comprehensive plan for its orderly, long-range conservation and management, and insure that any development which occurs within the permit area during the study and planning period will be consistent with the objectives of the Act. (Pub. Resources Code § 27001.) The state commission is required to submit such a plan to the Legislature by December 1, 1975. (Pub. Resources Code §§ 27300, 27320.) In order to prevent irreversible commitment of valuable coastal zone resources to uses inconsistent with the plan ultimately adopted, those who wish to perform any development within the permit area are, with certain exceptions, required to seek a permit from the regional commission. (Pub. Resources Code §§ 27400-27405.) (See *State of California v. Superior Court*, 12 Cal.3d 237, 253 [1974].)

There are two grounds for exemption from the permit requirements of the Act: (1) the common law vested rights exemption, expressly recognized by § 27404[2]

[2]Section 27404 provides in full: "If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; providing that no substantial changes may be made in any such development, except in accordance with the provisions of this division. Any such person shall be deemed to have such vested rights if, prior to November 8, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to the particular development or the issuance of a permit shall not be deemed liabilities for work or material."

and (2) an exemption, based on § 27400, as defined in *San Diego Coast Regional Com. v. See The Sea, Limited*, 9 Cal.3d 888 (1973).

Although the facts are slightly different and a different tract of land is involved, all of the parties' contentions are disposed of in *Avco Community Developers, Inc. v. South Coast Regional Commission*, ... Cal.3d ..... (1976).

Accordingly, we reverse the judgment.

NOT FOR PUBLICATION

We concur:

Dunn, *J.*

Kingsley, *Acting P. J.*
Jefferson (Bernard), *J.*

APPENDIX B.

Judgment Ordering Issuance of Peremptory Writ of Mandamus.

Superior Court of the State of California, for the County of Los Angeles.

Avco Community Developers, Inc., a California corporation, Petitioner, vs. South Coast Regional Commission, an agency of the State of California; and California Coastal Zone Conservation Commission, an agency of the State of California, Respondents. No. C 68939.

Filed: Aug. 5, 1974.

This matter came on for trial before this Court on April 30, May 6, May 16 and June 11, 1974 in Department 88 thereof, the Honorable David N. Eagleson, Judge Presiding.

Marvin G. Burns of Fulop, Rolston, Burns & McKittrick and Michael Abbott of Stephens, Jones, La Fever & Smith, appeared as attorneys for Petitioner and Evelle J. Younger, Attorney General, and Carl Boronkay, Assistant Attorney General, by Donatas Januta, Deputy Attorney General, appeared as attorneys for Respondents. The record of the administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented, and the Court having made Findings of Fact and Conclusions of Law, which have been signed and filed,

IT IS HEREBY ORDERED THAT:

1. A Peremptory Writ of Mandamus shall issue from this court, remanding the proceedings to Respond-

ents and commanding the California Coastal Zone Conservation Commission, its officers, members, agents, attorneys and employees to set aside its prior decision and issue an appropriate exemption certificate acknowledging that completion of Tract 7885 and the buildings thereon is exempt from the permit requirements of the California Coastal Zone Conservation Act.

2. Petitioner shall recover its costs in this action in the amount of $.....

Dated: Aug. 5, 1974.

/s/ David N. Eagleson
JUDGE OF THE SUPERIOR COURT

Judgment entered on ....., 1974 in Judgment Book ....., Volume ....., Page .....
....., Clerk
By .....
Deputy Clerk.

APPENDIX C.

Notice of Appeal.

Superior Court of the State of California, for the County of Los Angeles.

Avco Community Developers, Inc., a California corporation, Petitioner, v. South Coast Regional Commission, an agency of the State of California, et al., Respondents. No. C 68939.

FILED: Oct. 4, 1974.

TO PETITIONER AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Respondents hereby appeal from that certain judgment entered herein on August 5, 1974, Book 6944, page 58, of the records of the above entitled court, as amended by the court nunc pro tunc on August 21, 1974.

Dated: October 1, 1974.

EVELLE J. YOUNGER
Attorney General
CARL BORONKAY
Assistant Attorney General
RODERICK WALSON
Deputy Attorney General
/s/ Donatas Januta
DONATAS JANUTA
Deputy Attorney General
Attorneys for Respondents

APPENDIX D.

Los Angeles, Cal. Sept. 17, 1976.

TITLE:

Avco Community Developers, South Coast Regional Com. No. 45785.

The Court: Petition for rehearing and modification denied.

Clay Robbins, *Clerk*

APPENDIX E.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Nov. 12, 1976

I have this day filed Order Hearing Denied.

In re: 2 Civ. *No.* 45785 Avco Community Developers, Inc. vs. South Coast Regional Commission, et al.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX F.

Notice of Appeal to the Supreme Court of the United States.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Avco Community Developers, Inc., A California Corporation, Appellant, vs. South Coast Regional Commission, an agency of the State of California; and California Coastal Zone Conservation Commission, an agency of the State of California, Appellees. 2d Civ. No. 45785.

Filed: Nov. 24, 1976.

NOTICE IS HEREBY GIVEN that Appellant, AVCO COMMUNITY DEVELOPERS, INC., hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeal of the State of California, Second Appellate District, Division Four, entered in the above-entitled matter on September 17, 1976, Petition for Hearing denied November 12, 1976, which order denied Appellant's Petition for Rehearing and Modification after reversing the judgment of the trial court.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

DATED: November 23, 1976.

FULOP, ROLSTON, BURNS &
McKITTRICK
A Law Corporation
LAWRENCE R. RESNICK

KENNETH B. BLEY
By Kenneth B. Bley
KENNETH B. BLEY
Attorneys for Appellant, AVCO
COMMUNITY DEVELOPERS, INC.

Affidavit of Service by Mail.

AFFIDAVIT OF SERVICE BY MAIL

State of California, County of Los Angeles—ss.

I, NAN S. KALISH, certify and declare that I am a citizen of the United States, over the age of 18 years, employed by the Law Corporation of Fulop, Rolston, Burns & McKittrick, 9665 Wilshire Boulevard, 7th Floor, Beverly Hills, California, in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On November 23, 1976, I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the parties required to be served by depositing a true copy thereof to each, in a sealed envelope with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Post Office, City of Beverly Hills, State of California, addressed as follows:

Evelle J. Younger, Attorney General
Carl Boronkay, Assistant Attorney General

Roderick Walston, Deputy Attorney General
Donatas Januta, Deputy Attorney General
6000 State Building
San Francisco, California 94102

The Honorable David N. Eagleson
Judge of the Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, California 90012

The Supreme Court of the State of California
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010

Ballard Jamieson, Jr., Esq.
664 Hamilton Avenue
Palo Alto, California 94301

/s/ Nan S. Kalish
Nan S. Kalish

Subscribed and Sworn to Before Me this 23rd day of November, 1976.

/s/ Alice J. Fitch
Notary Public in and for said County and State